Supreme Court, U. S.
FILED
SEP 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1599

IN THE

Supreme Court of the United States

October Term, 1979

SCM CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

REPLY BRIEF OF PETITIONER SCM CORPORATION IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM E. WILLIS
125 Broad Street
New York, New York 10004
Counsel for Petitioner

JAMES E. TYRRELL
SULLIVAN & CROMWELL

MILTON WOLSON
SCM CORPORATION
Of Counsel

September 11 1980

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1599

SCM CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

REPLY BRIEF OF PETITIONER SCM CORPORATION IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner SCM Corporation ("SCM") submits this brief in response to the "BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION." In its Petition, dated April 12, 1980, SCM set forth the facts and legal analysis upon which it bases its request for issuance of a writ of certiorari. While SCM continues to rely upon the analysis contained in its Petition, SCM submits the present brief to correct certain inaccuracies which appear in the Federal Trade Commission's ("FTC" or "Commission") brief opposing SCM's Petition.

I

With regard to SCM's second and third reasons for granting a writ of certiorari (that the FTC entered a

permanent injunction against SCM without compliance with the proper standard for injunctive relief and that the FTC entered a more burdensome order against SCM than against Kraftco to punish SCM for exercising its due process right to a hearing), the FTC has premised its rebuttal upon an error or mischaracterization of fact. The Commission argues "that petitioner, which could violate the law again by entering into another interlocking directorate, has refused to make any binding commitment not to do so in the future." (FTC Br. at 9).*

To the contrary, SCM has never refused to provide the Commission with a commitment to refrain from violating Section 8 in the future. As the record in this case reflects, SCM offered the Commission voluntary assurances of future compliance with Section 8 by affidavit as early as November 16, 1975. (Sexton Aff., para. 10).** The voluntary assurance that SCM provided to the Commission closely paralleled the consent order that the FTC accepted as being in the public interest in the case of Mr. Bond. Throughout the proceedings in this case, the FTC Staff never requested a broader representation from SCM or even suggested that it would recommend any resolution of this case short of the cease and desist order that ultimately issued. Under such circumstances, it is fundamentally misleading for the FTC now to suggest to this Court that SCM "refused" to provide

---

* The FTC repeats this argument in an effort to justify the disparate treatment afforded to SCM and Kraftco: "petitioner had been unwilling to assure the Commission that it would avoid unlawful interlocks in the future." (FTC Br. at 11).

** As noted in SCM's Petition at 4 n., "[s]uch a voluntary assurance of future compliance was specifically contemplated by Section 2.21 of the Commission's Rules of Practice then in effect."

assurances that it would not again violate Section 8 and that such non-existent "refusal" constitutes "evidence" of the need for a permanent injunction against SCM.

II

In its Petition, SCM stated that the statutes involved in this case are Sections 8 and 11 of the Clayton Act, 15 U.S.C. §§ 19 and 21. (Pet. at 3). In its answering brief, the FTC asserts that Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) is also involved in this petition. (FTC Br. at 2). The FTC's explanation for the asserted relevance of Section 5 appears in a footnote as follows:

> "[E]ven if there were merit to petitioner's claim that only natural persons are subject to remedial orders under Sections 8 and 11 of the Clayton Act, the order against petitioner in the present case is sustainable on an independent statutory basis. The Commission found that the challenged director interlock violated Section 5(a) of the Federal Trade Commission Act . . . . Petitioner does not challenge the Commission's determination that it violated Section 5 of the Federal Trade Commission Act." (FTC Br. at 8 n.5).

The Commission is in error in maintaining that Section 5 provides an "independent statutory basis" for sustaining the Commission's order against SCM. Section 5 has not been involved in this proceeding at least since the Second Circuit held in its first opinion in this case that its ruling concerning Section 8 obviated the need to consider whether or not Section 5 was applicable and, if so, whether SCM had violated that statute (53a n.2). On remand, neither SCM nor the FTC even discussed the applicability of

Section 5 to the present case.* Likewise, there was no mention of Section 5 in the Commission's Opinion and Final Order (68-77a). No issue concerning Section 5 was briefed either by SCM or by the FTC on SCM's second petition for review to the Second Circuit.** And, the Court of Appeals made no mention of Section 5 in its second opinion in this case, stating instead that SCM was seeking review of an order "enjoning SCM from permitting interlocking directorates in violation of *Section 8* of the Clayton Act" (emphasis added) (79a). In short, Section 5 does not afford an "independent statutory basis" for sustaining the FTC's order against SCM—the authority for which must be based on Section 8, if at all.

---

* In a footnote to its brief on remand, SCM specifically preserved its position regarding Section 5:

> "SCM assumes that the Commission will be proceeding on this remand under Section 8 and not under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. On appeal to the Second Circuit SCM argued that Section 5 does not extend to regulation of interlocking directorates. Because of its holding regarding Section 8, the Court did not reach SCM's argument on Section 5. However, if the Staff urges or the Commission decides that this remand should proceed under Section 5, or jointly under Sections 8 and 5, SCM reserves the right to reiterate its Section 5 arguments." (SCM Br. on Remand at 11 n.).

Neither the Staff nor the Commission ever responded to SCM's statement regarding Section 5 or otherwise indicated that Section 5 was still involved in the case.

** In its brief to the Court of Appeals, SCM again noted that "the Commission appears to have proceeded only under Section 8." (SCM Br. at 4 n.4).

Conclusion

For the reasons set forth herein and in SCM's Petition, SCM respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

WILLIAM E. WILLIS
125 Broad Street
New York, New York 10004

Counsel for Petitioner

JAMES E. TYRRELL
SULLIVAN & CROMWELL

MILTON WOLSON
SCM CORPORATION

Of Counsel

September 11, 1980